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No. 629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

GRAIN ELEVATOR, FLOUR AND FEED MILL WORKERS, INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 418, AFL-CIO,

Petitioner,

vs.

ROSS M. MADDEN, Regional Director of the Thirteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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VS.

ROSS M. MADDEN, Regional Director of the Thirteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Courts of Appeals for the Seventh Circuit entered in this case on July 15, 1964.

OPINIONS BELOW

The orders of the United States District Court for the Northern District of Illinois, Eastern Division, appear in the Record* at Union App. pp. 38-40; 54-57; 94-96; 112-115; 310-313. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, pp App. 1-18, is reported in 334 F.2d 1014. The order of the Court of Appeals denying the petition for rehearing is printed in Appendix B, *infra*, p. App. 19.

JURISDICTION

The orders of the District Court were entered on June 3, June 14, August 14, September 24, and October 31, 1963. The judgment of the Court of Appeals was entered on July 15, 1964. The order of the Court of Appeals denying the petition for rehearing was entered on August 20, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Where a federal statute (18 U.S.C. §3692) expressly provides a right of trial by jury in all contempt cases arising under federal laws pertaining to injunctions which grow out of a labor dispute and Rule 38 of the Rules of Civil Procedure guarantees the right of jury trial whenever a federal statute so provides, may a district court deny a timely demand for trial by jury made by a labor organization charged with contempt of an injunction which had been issued under §10(l) of the Labor-Management Relations Act?

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* Separate appendices were filed in the Court of Appeals by the appellants and the appellee. In this petition for certiorari, references to the record are indicated as follows: "Union App." refers to appellants' appendix below; "Board App." refers to appellee's appendix below.

2. In view of §6 of the Norris-LaGuardia Act (29 U.S.C. §106), may a labor organization be adjudged in contempt by reason of the acts of some members whose conduct is not authorized or ratified by the labor organization?

3. When a labor organization has assets of $16,000 and prospective monthly dues income of about $1400, is the imposition of fines approximating $42,000 excessive in violation of the Eighth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provision of the Constitution of the United States which is involved is the Eighth Amendment. The statutes involved are the Labor-Management Relations Act, 1947, 29 U.S.C. §141 *et seq.*; the Norris-LaGuardia Act, 29 U.S.C. §101 *et seq.*; Rule 38 of the Federal Rules of Civil Procedure; and 18 U.S.C. §3692. Pertinent provisions of the statutes are set forth in Appendix C, *infra*, p. App. 20.

STATEMENT

On May 29, 1963 the District Court for the Northern District of Illinois entered a temporary restraining order (Union's App. 19-21) against the petitioner (herein called Local 418) in a proceeding initiated by a petition (Union App. 3-14) of the Regional Director of the National Labor Relations Board which invoked the jurisdiction of the District Court under §10(l) of the Labor-Management Relations Act. Local 418 is a union of some 244 members employed by twelve separate employers operating grain elevators in Chicago. Only 75 of its members are employed by Continental Grain Company (Union App. 319), which is the only employer involved in these proceedings. The

order restrained Local 418 from inducing Continental's employees to withhold their services for the purpose of causing Continental to cease doing business with Upper Lakes Shipping, Ltd., a Canadian shipowner whose vessels carried grain from Continental's elevator in Chicago to destinations in Canada. The order also directed Local 418 to withdraw any requests it might previously have made to the employees to refuse to load grain on Upper Lakes ships.

Shortly after the temporary restraining order was served on him, Jack E. Connor, president of Local 418, ordered the Continental employees—in the presence of Continental officials and a United States marshal—to perform their duties of loading grain on an Upper Lakes vessel. (Union App. 129, 137, 151, 159-160, 171). Nevertheless, the employees, who had also been served with copies of the court's order, refused to perform the ship-loading operations when so directed by their supervisors. (Union App. 152, 153, 156-157). The Regional Director of the National Labor Relations Board filed a petition in civil contempt against Local 418 (Union App. 21-28), and the court ordered Local 418 to show cause why it should not be held in contempt. (Union App. 28-29).

Local 418 filed an answer and demanded a trial by jury. (Union App. 30-32). The district court denied the jury demand although the provisions of 18 U.S.C. §3692 were expressly brought to the court's attention. (Union App. 119-120). The district judge conducted a trial without a jury and on June 3, 1963 he entered an order holding Local 418 in contempt and imposed upon Local 418 a fine of $1,000. (Union App. 38-40).

On June 14, 1963, the district court entered a temporary injunction against Local 418, similar to the order of May 29, except that it contained an additional paragraph pro-

hibiting *members* of Local 418 from refusing in concert to perform services for Continental. (Union App. 54-57). On August 6, the district court on its own motion entered another order striking and expunging the aforesaid paragraph *nunc pro tunc* from the order of June 14. (Union App. 77-78). On that day the Regional Director filed another petition in civil contempt against Local 418 (Union App. 67-75). Local 418 filed an answer thereto again demanding a trial by jury. (Union App. 83-85). The court denied the jury demand. (Union App. 195-196). After a trial without a jury the district judge entered an order (Union App. 94-96) finding Local 418 in contempt, on a showing that Continental's employees had refused to load grain on an Upper Lakes vessel on June 17, 20 and 21, 1963. The district judge imposed upon Local 418 a fine of $100 a day, retroactive from June 17 to August 14. The order provided that if Local 418 showed within 30 days that it had purged itself of contempt the fine would be remitted; but if not, a daily fine of $200 a day commencing August 14, 1963 would be imposed.

On August 20, 1963, Local 418 filed a motion to remit the fine and to show of record that the mandatory injunction had been complied with. (Union App. 97-102). Local 418 showed that it sent a registered letter on August 16. 1963, to each member employed at Continental advising the members, in the language of the mandatory injunction, that any requests that might have been made to them to refrain from loading grain on Upper Lakes vessels were withdrawn; the letter further stated that the men were free to perform any and all services for Continental. A copy of the letter was also posted on the Continental bulletin board, and it was read aloud at a special meeting called by Local 418 for those of its members who were employed by Continental. (Union App. 97-102). The Re-

gional Director filed an opposition to the motion. (Union App. 104-108). On September 17, 1963 the district court received Local 418's evidence of compliance, and then, over objection (Union App. 275), received evidence presented by the Regional Director concerning additional instances of alleged refusals by Continental's employees to load an Upper Lakes vessel. At the conclusion of the hearing, the district judge stated that the evidence showed that the conduct of Jack E. Connor, president of Local 418, was "commendable" and that Connor had purged himself of any contemptuous conduct, but that this was not "union conduct"; that "the past concerted activities for which each employee member has been punished remains unameliorated . . . they, as individual union members, have done nothing to show this Court that their activity is no longer concerted, or that they intend Jack Connor's present position also to constitute the action and the position of the labor union . . ." (Union App. 292-293). The court announced that it would deny the motion to remit the fine. Although the Regional Director had filed no pleading seeking imposition of greater fines, the district judge stated his own desire to enter an order increasing the fines. (Board App. 146-147). Local 418 filed an opposition to the proposed order, and again demanded a jury trial. (Union App. 110-111). The court denied the jury demand (Board App. 150) and entered an order (Union App. 112-113) on September 24 increasing the fine to $500 a day retroactive to September 17. The same order stayed the running of the fine as of September 20, when the Upper Lakes vessel had left Chicago. (Union App. 115). On October 14, 1963, the Regional Director filed a motion to reinstate and increase the fines, alleging new refusals by

Continental employees to load an Upper Lakes vessel. (Union App. 296-302). The answer filed by Local 418 once again demanded a jury trial. (Union App. 302-309). The court denied the jury demand (Union App. 322) and after a trial without a jury it entered an order on October 31 which imposed upon Local 418 a fine of $500 a day retroactive to October 29, and additionally imposed a retroactive fine of $3,000 a day for the days of October 4, 7, 11 and 26, 1963. (Union App. 310-211).

The fines imposed upon Local 418 totalled $42,800 as of November 27, 1963. On that date Local 418 showed total assets of approximately $16,000, and prospective monthly income from union dues of $1,460. (Union App. 247, 316-321, 390, 391).

Appeals followed and were consolidated in the United States Court of Appeals for the Seventh Circuit, which affirmed the District Court.

REASONS FOR GRANTING THE WRIT

I.

IMPROPER DENIAL OF TRIAL BY JURY

A federal statute, 18 U.S.C. § 3692, in the broadest language provides the right to a jury trial "In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute ...." In the case at bar, each condition of § 3692 was fully and literally present. These were cases of contempt within the scope of § 3692, for § 10(l) of the Labor-Management Relations Act under which they arose, is a law of the United States governing the issuance of injunctions or restraining orders; and the case involved or grew out of a labor dispute. Rule 38 of the Rules of Civil Procedure preserves inviolate the right of jury trial whenever it exists by reason of a federal statute. Nevertheless, the District Court denied the demands for trial by jury. (Union App. 119-120, 195-196; Board App. 150; Union App. 322).

In affirming the District Court, the Court of Appeals held that § 3692 is inapplicable to this proceeding. The Court of Appeals referred to §10(h) of the Labor-Management Relations Act. (*Opinion, infra,* App. p. 11). But § 10(h) does not deal with contempt proceedings, nor does it deal with the mode of trial, whether by court or by jury. It confers jurisdiction on courts sitting in equity, only in respect to the granting of temporary relief or a restraining order, or in proceedings to enforce an order of the Board, without limitation by the provisions of Norris-LaGuardia. There is no reference in § 10(h) to proceedings to enforce injunctions. In any event, the real issue is not whether Local 418 was entitled to a jury trial under Norris-

LaGuardia. *The issue is whether Local* 418 *was entitled to a jury trial under the far broader provisions of* § 3692. Nothing in the Labor-Management Relations Act withholds the application of § 3692 to contempt cases. Indeed, § 3692 was enacted a year after the Labor-Management Relations Act, so that it is manifestly incorrect to read into the earlier Labor-Management Relations Act any intention to withhold the jury trial rights contained in the later statute.

A comparison of § 11 of Norris-LaGuardia with the language of § 3692 clearly reveals the intent of Congress to broaden the right to jury trial in labor contempt cases. The repealed language of § 11 of Norris-LaGuardia provided the jury guarantee only in cases of contempt arising under *that* Act. When Congress repealed § 11 of Norris-LaGuardia, and enacted 18 U.S.C. § 3692, the broadest possible language was employed: "In *all* cases of contempt arising under *the laws* of the United States . . . ." (Emphasis supplied).

The courts below denied Local 418 a right to jury trial which a plain and broadly phrased statute guarantees. Rule 38 of the Rules of Civil Procedure forbids judicial repeal of statutes guaranteeing a jury trial. This Court has expressed repeatedly the policy which favors the recognition of the right to jury trials and to resolve doubts in favor of jury trials. *Simler* v. *Conner*, 372 U.S. 221; *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469; *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500; *Dimick* v. *Schiedt*, 293 U.S. 474, 486.

The opinion of the Court of Appeals cites only one case on the propriety of denial of trial by jury—*N. L. R. B.* v. *Red Arrow Freight Lines*, 193 F. 2d 979. That case however involved enforcement of a Board order in a court of appeals, an issue not involved in the case at bar.

The present case is one of first impression in this Court and we respectfully submit that the substantial issue warrants the granting of certiorari.

II.

UNION NOT LIABLE FOR UNAUTHORIZED CONDUCT OF MEMBERS

Under the Norris-LaGuardia Act, Local 418, a labor organization, cannot be held responsible for the acts of some members without proof of *"actual participation"* or *"actual authorization"*.

Section 6 of the Norris-LaGuardia Act is explicit:

> "Sec. 6. No officer or member of any association or organization and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of *actual* participation in, or *actual* authorization of, such acts, or of ratification of such acts after *actual* knowledge thereof." (Emphasis supplied)

In construing § 6 the Supreme Court said in *United Brotherhood of Carpenters* v. *U. S.*, 330 U.S. 395, at page 403:

> "We need not determine whether § 6 should be called a rule of evidence or one that changes the substantive law of agency. We hold that its purpose and effect was to relieve organizations, whether of labor or capital, and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member, charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration."

Local 418, a labor organization, was adjudged in civil contempt not because of its own conduct as an organization but because the unauthorized acts of some of its members were held by the District Court to constitute union action.

The record showed that promptly after the temporary restraining order was issued, Local 418's president ordered Continental's employees to load the Upper Lakes vessel (Union App. 158, 159, 166, 171) and he stated that the union intended to comply with the court's order. (Union App. 171). Connor, the union president, subsequently notified each Continental employee by letter, by notice on the company bulletin board, and by anouncement at a special meeting, that the union desired to comply, that any inducements were withdrawn, and that the men were free to perform any and all work. (Union App. 98-101). The injunction forbade Local 418 to induce work stoppages. Local 418 complied. The injunction forbade Local 418 to withdraw any prior inducements. Local 418 complied. The injunction did not command Local 418 to get ships loaded, but Local 418 was held in contempt because ships were not loaded. The District Court had stricken on its own motion (Union App. 78) the only provision of the injunction (Union App. 54-57) that applied to members of Local 418. Yet, when some members—without Local 418's participation or authorization—refused to load ships, Local 418 was held in contempt. This was not a case where there was even a suspicion of bad faith or subterfuge on the part of the union president. The District Judge himself so acknowledged at the conclusion of the September 17 hearing, when he referred to Connor's conduct as being "commendable". (Union App. 292-293). On that occasion the District Court stated the erroneous position that the conduct of the employees in refusing to load Upper Lakes ships constituted action of the union. The District Court

treated the acts of the responsible official of Local 418 as individual action, while treating the unauthorized acts of some members as union action.

The effect of the District Court's orders is directly contrary to the law as set forth in § 6 of Norris-LaGuardia and by this Court, and warrants the granting of certiorari. The Court of Appeals apparently holds that § 6 of Norris-LaGuardia was not applicable because of § 10(h) of the Labor-Management Relations Act. (Opinion, Appendix A, *infra*, App. p. 11). But § 10(h) merely grants to the courts jurisdiction to issue injunctions; it makes no reference and has no application to contempt proceedings. To interpret § 10(h) as repealing § 6 of Norris-LaGuardia in contempt proceedings is to repeal Norris-LaGuardia by implication, which this Court has held may not be done. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). The judgment of the Court of Appeals affirming the orders of the District Court appears to be in conflict also with the decisions in which this Court for many years has recognized that a labor organization is a self-contained legal entity wholly distinct from its individual members and not to be bound by the unauthorized acts of individual members. *United Mine Workers* v. *Coronado Co.*, 259 U.S. 344, 385-386, 393, 395; *U. S.* v. *White*, 322 U.S. 694, 701-703; *Machinists* v. *Street*, 367 U.S. 740, 808; *Machinists* v. *Gonzalez*, 356 U.S. 617, 619.

The serious consequences of the course followed by the District Court becomes apparent from the following statements of the District Court:

> "Since this was union action. Our Marshall is able to accommodate 244 men. They will stand committed until the fine is paid. The question here is not the payment of fine. The question here is whether or not they can make this bond for appeal.
>
> • • •

> "I am also indicating that if the fine becomes final, failure to make the supersedeas bond, then the members of union will stand committed to a common jail until the fine is made or until the fine is paid, all 244 members." (Union App. 403-404).

After holding the union liable for the acts of a minority group of the membership and imposing large fines on the union without proof of its authorization or ratification, the court then threatened to incarcerate *all* of the 244 union members if the union failed to pay the fines or post bond.

The pernicious consequences of the decision below are apparent. First, a union is held liable for the acts of individual members or of a minority group of members without proof of authorization or ratification. Second, individual members of a union become subject to personal financial responsibility and loss of liberty for the simple failure of their union to pay a fine imposed upon the union, even though the particular individuals may never have been involved in the slightest in the dispute. Thus the individual union member becomes liable not only for what his union has done, but also for what dissident groups within the union may have done without his authorization, ratification or even knowledge.

The importance of the position of labor organizations in contemporary society requires no elaboration. The judgment below, which judicially repeals an important protection of the Norris-LaGuardia Act and which also departs from established law concerning labor unions as legal entities, raises substantial questions which affect vitally the status and relationship of many thousands of labor organizations and their millions of members, and warrants this Court's review.

III.

EIGHTH AMENDMENT VIOLATED BY EXCESSIVE FINES

The record shows that Local 418 had a net worth of approximately $16,000 and that its prospective monthly income from membership dues was approximately $1,400. (Union App. 247, 316-321, 390). As of November 27, 1963 the fines amounted to $42,800. This Court held in *United States* v. *United Mine Workers of America*, 330 U.S. 258, 304 (1947) that a court must "*in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant.*" (Emphasis supplied). The fines in the case at bar are excessive, as they so far exceed Local 418's resources and prospective income as to threaten destruction of the union. Since only a fraction of Local 418's members were employed by Continental, and the majority of the members were employed at other plants not involved in these proceedings, the unjust consequence of the fines would be to cripple or wreck the union that must serve these members as well as those who work at Continental.

The record shows that the initial fine of $100 a day was double the income of Local 418; the fine of $200 a day was four times the income; the fine of $500 a day was ten times the income; and the fine of $3,000 a day was sixty times greater than the income of Local 418. The total amount of the fines was an amount two and one-half times greater than the entire net worth of Local 418. Clearly the fines were excessive.

The Court of Appeals held that Local 418 could not complain because the large fines were "as a consequence of the impact of its defiance of the orders." (Opinion, Appendix

A. App. 15). By this re[illegible]ning the protection of the Eighth Amendment would [illegible] made meaningless, since it would be withheld from those who are found guilty and who need protection against excessive fines; its protection would be granted only to those found not guilty and who are not fined at all.

It is significant that a substantial portion of these large fines resulted from the fact that the District Court imposed several unconditional fines for alleged contempts which had occurred prior to the issuance of the court orders. For example, the order of October 31, 1963 (Union App. 310-311) imposed an unconditional fine totalling $12,000 ($3,000 per day) for conduct which was alleged to have occurred on October 4, 7, 11, and 26, 1963. Since the District Court proceedings were all in civil contempt, the District Court improperly imposed punitive or criminal penalties. Such penalties may only be imposed in proceedings which are instituted and tried as for criminal contempt, only coercive sanctions being appropriate in civil contempt. *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911); *Nye* v. *United States*, 313 U.S. 33, 42-43 (1941); *Parker* v. *United States*, (1 Cir. 1946) 153 F.2d 66, 70-71; *Flight Engineers Int. Assn.* v. *Eastern Air Lines, Inc.*, (5 Cir. 1962), 301 F.2d 756; *Cliett* v. *Hammonds* (5 Cir. 1962), 305 F. 2d 565, 569-570. This issue was raised below but it was not discussed in the opinion of the Court of Appeals. As all of the orders were affirmed, however, it is clear that the Seventh Circuit in the case at bar has affirmed the imposition of punitive sanctions in these civil proceedings contrary to the applicable decisions of this Court warranting review by this Court.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1963, APRIL SESSION, 1964

Nos. 14361-2-3, 14429

Ross M. MADDEN, Regional Director of the Thirteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,
Petitioner-Appellee,

v.

GRAIN ELEVATOR, FLOUR AND FEED MILL WORKERS, INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 418, AFL-CIO; and SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA,
Respondents-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

July 15, 1964

Before DUFFY, SCHNACKENBERG and KNOCH, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Consolidated in this court are four appeals from the district court brought by the Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Association, Local 418, AFL-CIO,

herein designated as the Local, and Seafarers' International Union of North America, herein designated as SIU, respondents, who were also respondents below as named in several petitions filed by Ross M. Madden, Regional Director of the National Labor Relations Board, for and on behalf of said Board, petitioner, for injunctive and other relief. Jurisdiction is based on Section 10 (*l*) of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 160 (*l*), as amended, alleging violations of the secondary boycott provisions of § 8 (b) (4) (i) and (ii) (B) of the Act, by SIU and the Local. Respondents filed an answer which denied that the Board or the district court had jurisdiction and denied various other material allegations of the petition.

On May 29, 1963, the court issued a temporary restraining order, which in substance enjoined respondents and all members acting in active concert with them from in any manner or by any means including picketing orders, directions, instructions, requests or appeals inducing or encouraging any employee of Continental Grain Company (hereinafter called Continental) to refuse to handle any goods at the port of Chicago, where the object thereof was to force Continental to cease doing business with Upper Lakes Shipping, Ltd., a Canadian corporation (hereinafter called Upper Lakes).

The same day copies of the order were served upon Jack E. Connor, the president and business agent of the Local, and upon the employees of Continental, which then ordered several employees to load the *Howard L. Shaw,* a Canadian flag vessel owned by Upper Lakes. Continental had about 33 employees working that day who were all members of the Local[1] and 28 were present at a meeting

[1] Included were two men on vacation and some men doing carpenter and other work.

in the lunchroom. While there Connor addressed the group, read the court's order, except the last paragraph, which was, however, read by the United States marshal who noticed the omission.

Upon the suggestion of Connor that the men might want to talk among themselves, the marshal and other non-members left the lunchroom and the meeting proceeded there. In a few minutes Connor came out of the meeting room and said that the men were going to vote. Connor returned to the meeting room and then came out and said that the men were not going to load the ship.

Thereafter the men refused to load the ship and the Shaw vacated the berth to let another steamer, the *Allendale* (not an Upper Lakes ship), in to load.

On May 31, 1963, the board filed a petition in civil contempt against the Local and the court entered an order directing it to show cause why it should not be held in contempt of court. The Local answered the petition and demanded a trial by jury, which was denied. Following a bench trial, the court on June 4, 1963 entered findings of fact, conclusions of law and an order, which found the Local in civil contempt of court by reason of its disobedience and refusal to comply with the temporary restraining order. The Local was ordered to purge itself of contempt by obeying the order of May 29, 1963 and paying the sum of $1,000 by check or money order payable to the Treasurer of the United States.[2]

On June 14, 1963, the district court, after hearing evidence on the Board's petition, entered findings of fact and conclusions of law and an order granting a temporary

[2] The Local on June 27, 1963 filed a notice of appeal from the order of June 4, 1963.

injunction prohibiting SIU and the Local from encouraging or inducing employees to refuse to perform services, or from coercing Continental, if an object thereof was to force Continental to cease doing business with Upper Lakes, and directing the Local, its officers and agents, to withdraw all requests or appeals previously made to Continental employments to refrain from loading grain on ships of Upper Lakes and to advise the employees that they were free to perform any and all services for Continental.[3]

Following a hearing on a petition filed August 6, 1963 by the Board, the court on August 14, 1963, made findings of fact and conclusions of law, and entered an order adjudging the Local in contempt, and fining it $100 a day retroactively from June 17, 1963. The order provided that the fine would be remitted if the Local within 30 days purged itself, otherwise the fine would be $200 a day beginning August 14 for each day that it failed to comply.[4]

On August 20, 1963, the Local filed a motion to remit the fine on the ground that Connor, its president, had, by letter dated August 16, 1963, notified each member that all requests or appeals, if any, to employees of Continental to refrain from loading grain on Upper Lakes ships were withdrawn and that each was free to perform any and all services for Continental. This letter was read by Connor to the members at a special meeting.

On September 23, 1963, the Local filed a notice of appeal from the contempt order which had been entered on August 14.

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[3] The Local and SIU by the same notice appealed from the order of June 14, 1963.

[4] On August 14, 1963 the court dismissed the contempt proceeding as to SIU.

On September 17, 1963, a hearing was held on the Local's August 20 motion. The court heard evidence and argument and entered its opinion, remarking that Connor's action did not purge the Local and that it did not constitute union action. Thereupon, on September 24, 1963, the court denied the motion to remit the fine, and it did not grant a trial by jury. It also entered an order *nunc pro tunc* as of September 17, 1963, which *inter alia* decreed that the daily fine of $200 imposed by the order of August 14, 1963 be increased to $500 a day from September 17, 1963, and that in all other respects the order of August 14, 1963 should remain in full force and effect.

The court also ordered on September 24, 1963 a suspension of the daily fines starting September 20, 1963, the date upon which the *Shaw* sailed from Chicago. The court on September 24 stated that the injunction order was still in effect and that fines thereinafter to be set would be measured at $3,000 a day when opportunity to demonstrate obedience to the court's order should present itself and "such opportunity is not carried forward. This is prospective."

On October 16, 1963, the Board's motion called the court's attention to the fact that the Local had been guilty of refusal by the employees to load the *S. S. Erickson*, another Upper Lakes vessel. The Local answered and again demanded a trial by jury, which was denied. The court heard evidence and, on October 31, 1963, ordered the Local to purge itself by complying with the order of June 14, 1963, and on refusal ordered reinstated the fine of $500 a day beginning October 29, 1962 and imposed a fine of $3,000 a day for October 4, 7, 11 and 26, 1963 (when

the *Erickson* docked and Local 418 had not complied with the prior order of the court in regard to loading). The order further provided for the Local to file within 30 days from October 29, 1963 an appeal bond of $27,300 plus $500 for each day from the date of the order until the bond was posted, and lacking a bond all fines accrued should be due and payable.

The Local made a motion that the part of this order relating to the appeal bond be vacated, which motion was, on November 27, 1963, denied.

On December 2, 1963, the Local's notice of appeal from the order entered October 31, 1963 and the order entered November 27, 1963, was filed.

1. Respondents contend that the district court failed to comply with 28 U.S.C.A. rule 52 (a), inasmuch as, according to respondents, the court made no findings of fact and conclusions of law when it entered the orders of September 24 and October 31. We disagree. The record is replete in this respect.[5]

(a) For instance we refer to parts of the record relating to the order of September 24, 1963. The stenographic transcript reveals a detailed analysis of the evidence and the court's findings of fact. It specifically found, as the result of a review of the testimony of various witnesses, that, on August 19, 1963, "nevertheless the men refused" to load the *Shaw*.

The court stated that in June 1963 it had found that there was in fact a secondary unlawful boycott, as a con-

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[5] It is not necessary that all of these findings be in the form of written statements. *American Glass Co.* v. *Michigan Mutual Liability Co.*, 7 Cir., 327 F.2d 776, Fn. 2 (1964).

sequence of which an injunction issued, and subsequently thereto the court held the Local in contempt of court. The court then referred to the letter of Connor to the members of the union advising them that they were free to perform all services for Continental, but it did not hold that this letter was sufficient to purge each union member as an employee of Continental. It did hold that, in order for the fine to be remitted, each employee member must purge himself of contempt, and that the union, under its constitution and bylaws, would not be purged by the action of the president alone. The court found and held that Connor's conduct constituted an act of purging on his part, but that it did not constitute union action. Moreover, finding no organizational action by the union, the court said that it must find that the union had done nothing to purge itself of contempt in these proceedings "but, rather, has continued its conduct without change in an identical nature and in an identical manner with that conduct which existed prior to the citation for contempt and which resulted in the fine from which the union seeks relief."

The court also stated that they (the members) "while they approve of their prior secondary boycott activities, they, as individual union members, have done nothing to show this Court that their activity is no longer concerted or that they intend Jack Connor's present position also to constitute the action and the position of the labor union".

Accordingly, the court denied the motion to remit.

The court added

> "* * * I am still convinced that the conduct of these men is concerted action * * *."

(b) As to the order of October 31, 1963, the transcript reveals that the court dictated his findings and conclusions, which are reproduced verbatim.[6]

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[6] "I find from the evidence presented at this hearing that on or about October 4th of 1963 the SS Erickson, being a ship of the Upper Lakes Shipping Company, Limited, docked at the Port of Chicago alongside of Elevator B of Continental Grain Company and was prepared for the loading of grain;

"That the employees, members of Local 418, the respondent union, of Continental were ordered by Continental Grain Company through its supervision, Gunther Goldschmidt, to load the ship;

"That the employees, members of the respondent, unanimously and in concert refused to load the ship.
(Footnote [6] continued.)

"I find that the conduct is evidence of a continuation of a secondary boycott which was ordered by this Court to be discontinued in its injunctive order signed by this Court on June 14, 1963.

"I find that thereafter, on October 6th of 1963, a ship of Upper Lakes Shipping Company docked alongside Elevator A of Continental Grain Company at the Port of Chicago and that the superintendent called all employees, approximately 24 of them appeared, and ordered them to load the vessel;

"That all 24 unanimously and in concert indicated simultaneously with raised hands that they refused to load the ship.

"I find further that this conduct of refusal is evidence of a continuation of a secondary boycott which was enjoined by the order of this Court on June 14, 1963.

"I find that further on October 11, 1963 the Erickson, a ship of the Upper Lakes Shipping Company, Limited, docked alongside Elevator B at the Port of Chicago.

"Continental Grain Company again ordered its employees to load and they unanimously and in concert refused to load and that this conduct constituted evidence, clear and convincing evidence, to this Court of a continuation of the secondary boycott which this Court ordered discontinued on June 14, 1963.

(c) We note the contention of respondents that the court, when entering the temporary injunction on June 14, 1963, made no findings or conclusions sufficient to establish jurisdiction, in view of this statement from *Incres S.S. Co.* v. *Maritime Workers*, 372 U.S. 24, 27:

> " * * * The Board's jurisdiction to prevent unfair labor practices, like its jurisdiction to direct elections, is based upon circumstances 'affecting commerce,' and we have concluded that maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2 (6), 29 U.S.C. § 152 (6)."

However, the district court cited the "uncontradicted testimony" of the vice-president of Continental and a contract between Continental and Upper Lakes, as establishing

> " * * * that a large amount of grain was to be shipped from Continental's Chicago elevators via foreign vessels to Canadian elevators for temporary storage. A substantial portion of that grain thereafter ultimately will reach overseas ports. Continental ships approximately one-fourth our national exports in grain, and though some of this is moved the Canadian elevator arrangement would require substantial rearrangement of other means of interstate movement of the grain. * * * "

"I find that again on October 26th, 1963 the Erickson, or the SS Erickson, a ship of Upper Lakes Shipping, Limited, again docked, prepared to load, that Continental Grain Company ordered its employees to load the ship and that there were 22 who refused to load and none who agreed to load, and that this was continuing, concerted action, a continuation of the secondary boycott which was enjoined by this Court on June 14, 1963.

"I find the conduct of the respondent union in each of those four instances deliberate and contemptuous of the orders of this Court, for which they shall be fined for each of said instances the amount of $3,000."

Accordingly the court found "no question about the fact that [interstate] commerce is affected".

In the case at bar, no attempt is being made to regulate or to apply the Act to the "internal management or affairs" of the Upper Lakes ships; the injunction does not regulate the internal affairs of its ship. No conflict between American and Canadian policies can result from halting an illegal secondary boycott in this country, directed against an American employer by an American labor organization and involving employees working in a domestic plant of the American employer.

2. The Local based its demand for a jury trial on 18 U.S.C.A. § 3692, which provides:

> In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed.
>
> This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders or process of the court.

The Local contends that this case fulfilled each requirement necessary to come within the protection of § 3692; that it involves or arises out of a labor dispute regardless of the fact that the government is a party.

However, we note the following facts shown by the record:

Before the 1963 Great Lakes shipping season opened, SIU asked a union convention to continue to support SIU in its dispute with Upper Lakes as they had done the prior

year, when the Local members at Continental had refused to load Upper Lakes ships; that the delegates to that convention, including those from the Local, pledged to continue such support; that following the convention, the Local conveyed this threat of work stoppages to Continental; and that thereafter, when Continental sought to load Upper Lakes ships, the Local made good its pledge to SIU and its threats to Continental.

Inasmuch as Continental was a neutral to whatever dispute the SIU or the Local had with Upper Lakes, and Continental merely did business with Upper Lakes, it is apparent that the work stoppage by members of the Local who were Continental employees, occurred on Continental premises. This was a secondary boycott. We cannot agree that the Local's activity was primary, rather than secondary. Any other conclusion would, in effect, nullify the secondary boycott provisions of the Act.[7]

Section 3692 covers matters formerly found in § 11 of the Norris-LaGuardia Act. It is inapplicable to a proceeding under the Labor Management Relations Act. This inapplicability is evidenced by § 10 (h) (29 U.S.C.A. § 160 (h)) of said Act, which excludes such proceedings as injunction and enforcement from the limitations of the Norris-LaGuardia Act. *Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442 (1948); *Building and Construction Trade Coun. of Met. Dist.* v. *Alpert*, 1 Cir., 302 F.2d 594, 596-7 (1962).

In *National Labor Relations Board* v. *Red Arrow Freight Lines*, 5 Cir., 193 F.2d 979 (1952), where a charge of contempt of a court of appeals was being considered, it was held that respondents were not entitled to a jury trial.

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[7] Respondents' brief states that Continental was a party to this suit. This statement is in error. It merely filed charges with the National Labor Relations Board.

Accordingly we hold that the district court properly denied respondents a trial by jury.

3. There is in this case implicit agreement by counsel that the law is: pending appeal, a district court may enforce its order for injunction or an order in a contempt proceeding based upon a violation of its order. Thus, counsel for respondents have not contended that their notices of appeal stayed the injunction orders or the contempt proceedings.

4. We hold that, in enforcing its orders, the district court may adapt the form of the application of its power according to the resistance to enforcement with which it is confronted. Inasmuch as the court pursued this course in the case at bar, we approve its actions. If its imposition of fines, based on each day a party fails to comply with an injunctional order, does not result in compliance, the court may increase such fines for subsequent days.

5. However, respondents urge upon us that the order of October 31, 1963 was invalid because the court had no power to amend the prior orders of August 14 and September 24, 1963, after notices of appeal had been filed from said orders. No such amendment occurred. When the August 14 order proved ineffective, the court further exercised its powers of coercion by entering the order of September 24, 1963. That was a new order which did not alter the amount of the fines levied by the August 14 order for the period prior to September 17, 1963. The September 24 order was more coercive, inasmuch as it carried a greater daily fine, but it was an order for a new period and not an amendment of an earlier order.

Again, the court's order of October 31, 1963 did not amend the two earlier orders. While it had suspended the accumulation of fines while no Upper Lakes vessel was

in port, the court had then made it plain that, if the unlawful conduct should recur, it would reinstate and increase the fines. Thus the order of October 31, 1963, based on renewed violations, imposed new fines for a different period than the preceding orders and was designed to continue coercive pressure by the court to obtain compliance with its injunctional order.

Respondents in the case at bar fail to distinguish between a court's substantially and prejudicially amending its initial determination or judgment after an appeal has been perfected, and a situation, as here, where a court simply continues to seek, by lawful coercion, compliance by a recalcitrant litigant with an injunctional order of the court.

6. Respondents argue that the Board did not sustain its burden of proof by clear and convincing evidence that the Local had committed acts in violation of either of the injunction orders and hence the district court was without authority to hold the Local responsible. They rely upon §6 of the Norris-LaGuardia Act (29 U.S.C.A. § 106) and its construction in *United Brotherhood of Carpenters* v. *U. S.*, 330 U.S. 395, 403 (1947). However, as we pointed out, *ante* 9, in *Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, at 442, the Supreme Court recognized that, by § 10 (h) of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 160 (h), Congress has removed the limitations of the Norris-LaGuardia Act upon the power of a court sitting in equity to issue injunctions against secondary boycotts when sought by the National Labor Relations Board. It will be noted that this is such a case. At a meeting of the members of the Local, the situation was discussed and a vote of the members was taken. Thus the Local was authorized by its members to and did engage in the boycott. It persisted therein despite the orders of the court. Inasmuch as we find that the petitioner has

proved by clear and convincing evidence that the Local violated the injunction orders, we hold that the Norris-LaGuardia Act (especially § 6 thereof relied upon by respondents in support of their plea for reversal of the contempt orders), is not applicable.

7. Seeking refuge in the constitution of the United States, the Local argues that the fines imposed were excessive and violated the eighth amendment.[8] It says that the fines imposed upon it are completely out of proportion to its financial resources. It relies on *United States* v. *Mine Workers*, 330 U.S. 258 (1947), where a majority of the court felt that an unconditional imposition of a fine of $3,500,000 against the defendant union was unwarranted as punishment for the criminal contempt theretofore committed. But the court, at 305, said that the judgment should be modified so as to require the defendant union to pay a fine of $700,000 and, *further, to pay an additional fine of $2,800,000 unless within five days after issuance of the mandate it showed that it had fully complied with a temporary restraining order and a preliminary injunction issued in that case,* and, at 307, the court said:

> " * * * Punishment in this case is for that which the defendants had done prior to imposition of the judgment in the District Court, coupled with a *coercive imposition upon the defendant union to compel obedience with the court's outstanding order.*" (Italics supplied.)

In the case at bar the accumulation of fines against the Local was the direct result of its refusal to obey the orders of the district court. The imposition of the fines was for

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[8] Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, * * *.

the purpose of coercing the Local into obeying the court's orders. Obedience was called for and defiance was the response. The natural result of the Local's recalcitrance was more coercive orders from the court. If this brought financial discomfort to the Local, it had only itself and those who advised it to blame, because the court, in seeking obedience to its orders, was required to exert more pressure.[9] It must have been apparent to the Local, if it were well-advised, that it could not defy the valid orders of a United States court. The fining and subsequent accumulation of successive fines came, not as a punishment of the Local, but as a consequence of the impact of its defiance of the orders. The series of orders fixing the amounts of fines was geared to and measured by the response of the Local to the court's orders. It has no right to complain of the results which followed its persistent violations, any more than an overweight individual has just cause for complaint against the scale upon which he stands which informs him of his overweight. While the fines were accumulating it might have been well for the Local to have consulted with its advisors as to the effect upon its alleged 'net worth of * * * about $16,000.00'' and its alleged monthly income of ''around $1300'', of which it now informs us.

We cannot say that the fines imposed were excessive.

8. Respondents' brief contends that the order of September 24, 1963 was invalid because the court denied due process of the Local when, it says, the court ''imposed a new penalty for alleged contempt even though no petition or motion for contempt was pending''.

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[9] If fines were ineffectual, jail sentences of individuals responsible for the Local's stubborn noncompliance would have also been within the court's power.

Our examination of the proceedings in the district court reveals substantially the following:

On September 17, 1963, respondents' counsel presented the Local's motion to remit fine and show of record that the mandatory injunction entered on June 14, 1963 had been satisfied.

In the course of the proceedings, petitioner's counsel, in resisting the motion to remit, stated, in part:

> "They have defied this Court the entire summer, they have defied the Labor Relations Board and the laws of the United States Government since early in April and *they are continuing to do this,* your Honor. If this is held to be compliance then this entire proceeding has been a nullity.
>
> "* * * I have witnesses to show there have been four separate attempts to load these ships since the contempt order and the men themselves *still stand* en masse and *will not* load the ships. They have not done anything except what they have previously done all summer." (Italics supplied.)

The court pointed out that, as he considered the Local had made a prima facie case of compliance, it became necessary (for the Board) to show that in fact this was not compliance and that in fact 'they have not discontinued a secondary boycott but *are* actually and in fact *continuing* a secondary boycott". (Italics supplied.)

The court referred to the answer of the Board, saying

> "I do say that *the issue is joned as to whether or not there has been compliance* with the mandatory injunction. *The issue is joined and I am ready to proceed with the hearing.*" (Italics supplied.)

It is interesting to note that, while the court indicated its intention of proceeding to hear evidence pertaining not only to the motion to remit but also to compliance with the injunction up to the very time of the hearing, and actually *did hear evidence within that time scope,* Local's counsel, who participated in such hearing, made no suggestion that there had been no notice filed or order to show cause issued, such as they *now* say was required by rule 18 of the local rules of civil procedure of the district court. Therefore they waived any right to insist upon such a step or steps being taken. At the conclusion of the hearing the court directed the drafting of an order, with the statement that he would increase the fine forthwith from $200 to $500 a day.[10]

The requirements of due process of law were met in the proceeding of September 17, 1963 which culminated in the entry of the foregoing order. The Local was represented that day in open court by able counsel, who had represented it throughout the entire prior proceeding in the district court and since in this court. It was advised of the charges against it by the above-detailed proceeding in open court. It therefore had a reasonable opportunity to meet those charges by way of defense or explanation and, through its several attorneys, actually made a substantial defense and what they considered an explanation. The Local's counsel, three in number, had the right to call witnesses, if they saw fit. They called none. Actually they expressed no intention of calling witnesses. Cf. *Cooke* v. *United States,* 267 U.S. 517, 536 (1925), cited by the Local in its brief here.

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[10] Because of the anticipated absence from court of some of the counsel, the presentation and entry of the order were delayed until September 24, 1963.

The proceeding on September 17, 1963, resulting in the September 24 order, was conducted in accordance with constitutional principles.

9. We now turn to respondents' contention (which is probably frivolous), that there can be no contempt of the order of June 14, 1963 because that order became a nullity by reason of the district court's substantive amendment thereof, *sua sponte*, on August 6, 1963 when it deleted paragraph 2[11] thereof *nunc pro tunc* as of June 14, 1963. They maintain there was no compliance with 28 U.S.C.A., rule 65, providing that an order or injunction must be complete in itself and not dependent on any other document. This deletion in no way affected the remainder of the injunction order, because respondents agreed to, if they did not induce, the deletion of paragraph 2.[12] They are in no position to complain.

For these reasons, we affirm the orders from which these four appeals were taken.

ORDERS AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

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[11] Said paragraph prohibited "all members" of the Local from refusing in concert to perform services for Continental if an object thereof was to force it to stop doing business with Upper Lakes.

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[12] On August 6, 1963, respondents' attorneys filed a withdrawal of their "Notice of Appeal which was filed on June 27, 1963, it appearing in open court that upon such withdrawal the District Court will enter an order amending its injunction order of June 14, 1963, by striking out Paragraph 2, Page 4 thereof."

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago 10, Illinois

Thursday, August 20, 1964.

Before

Hon. John S. Hastings, Chief Judge

Hon. F. Ryan Duffy, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

Hon. Latham Castle, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

Ross M. MADDEN, Regional Director, etc.,
Petitioner-Appellee,

No. 14361, 62, 63, 14429 *vs.*

GRAIN ELEVATOR, FLOUR AND FEED MILL WORKERS, ET AL.,
Respondents-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court sitting *en banc* that the petition for a rehearing of this cause *en banc*, filed by respondents-appellants, be, and the same is hereby DENIED.

APPENDIX C

PROVISION OF THE UNITED STATES CONSTITUTION INVOLVED.

AMENDMENT VIII—EXCESSIVE BAIL, FINES, PUNISHMENTS.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTES INVOLVED.

Title 18 United States Code § 3692.

§ 3692. Jury trial for contempt in labor dispute cases:

In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct or disobedience of any officer of the court in respect to the writs, orders, or process of the court. June 25, 1948, c. 645, 62 Stat. 844.

The Norris-LaGuardia Act, (29 U.S.C. § 101 *et seq.*).

§ 106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of

individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

§ 111. In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed. *Provided* That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court. (Repealed, June 25, 1948, c. 645, § 21, 62 Stat. 862.

The Labor Management Relations Act, 1947,
29 U.S.C. § 141 *et seq.*

Jurisdiction of courts unaffected by limitations prescribed in sections 101-110 and 113-115 of this title

§ 160(h) When granting temporary relief or a restraining order, or making and entering a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited in sections 101-110 and 113-115 of this title.

Rules of Civil Procedure for the United States District Courts.

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.